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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

No. 561

MARK SKINNER WILLING, ET AL.,
Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE

Statement 1

Role allotted to respondent 7

Equitable jurisdiction not a local property rule 8

Alleged conflict with decision of this court 9

What is a justifiable controversy 11

The precedents 15

Federal jurisdiction 18

Conclusion 20

Table of Cases.

Bacon v. Felt, 38 Fed. 870 19

Barney v. Latham, 103 U. S. 205 19

Bates v. Carpentier, 98 Fed. 452 19

Bedford Stone Company v. Oman, 134 Fed. 441 13

Blair v. Chicago, 201 U. S. 400 13

Boatman's Bank v. Fritzlen, 135 Fed. 650 19

Brooks v. Clark, 119 U. S. 502 19

Brown v. Cox, 158 Ind. 364 13

Carothers v. McKinley Mining Co. 116 Fed. 947 19

Clark v. Smith, 13 Pet. 195 9

Deepwater Ry. Co. v. Western Pocahontas Co. 152 Fed. 824 19

Devine v. Los Angeles, 202 U. S. 313 10

Fulwiler v. McClun, 285 Ill. 174 ..... 9, 11, 15

Gavin v. Curtin, 171 Ill. 640 ..... 9, 11

Geer v. Mathiesen Alkali Works, 190 U. S. 428 19

Guffey v. Smith, 237 U. S. 101 9

Holland v. Challen, 110 U. S. 15 17
Hygrade Provision Company v. Sherman, 266 U. S. 497 14
McArthur v. Hood Rubber Company, 221 Mass. 372 16
McConihay v. Wright, 121 U. S. 201 9
McMullen v. Halleck Cattle Company, 193 Fed. 282.. 19
Ohio Tax Cases, 232 U. S. 576 13
Pacific Railroad Removal Cases, 115 U. S. 1 19
Packard v. Banton, 264 U. S. 140 14
Rector v. Rector, 201 N. Y. 1 16
Risty v. Railway Company, 270 U. S. 378 13
Road District v. Railway Company, 257 U. S. 547.. 19
Schwab v. St. Louis, 310 Mo. 116 17
Shaffer v. Carter, 252 U. S. 37 13
Sharon v. Tucker, 144 U. S. 533 ..... 11, 15
Slegel v. Herbine, 148 Pa. St. 236 17
Terrace v. Thompson, 263 U. S. 197 14
Truax v. Raich, 239 U. S. 33 14
Tyson v. Banton, ... U. S. 14
Vaca Valley Company v. Mansfield, 84 Cal. 560 13
Voss v. Murray, 50 O. St. 19 17
Young Ex parte, 209 U. S. 123 14
Young v. Southern Pacific Company, 15 Fed. (2d) 280 19

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BRIEF FOR RESPONDENT.

STATEMENT.

The controversy in this case is one between private parties, involving no question of public policy and no decision of any court falling within the specifications of paragraph 5b of Rule 35 of this court. There is nothing in the rules or decisions of this court to warrant the application for a writ of certiorari, especially in the absence of any final decree in either of the courts below.

The respondent, Chicago Auditorium Association, erected the Auditorium building about forty years ago upon a site occupied by it under leases which now run until the year 2085. The land was vacant, and the lessee acquired the right to use it for any lawful purpose not prohibited by the leases. The only pertinent qualification which they impose upon the free and unre-

stricted use of the property is found in a covenant to erect a substantial fireproof building of a stated minimum cost, the character of which is not otherwise specified, and to keep the building on the demised premises at all times during the term in good order and repair. The Auditorium, though erected in compliance with the requirements of the leases and accepted by the lessors as such, was built on the eve of the development of the modern art of steel construction, and before the engineering problems involved in such large and massive edifices had been solved. (R. 346-7.) Like many less pretentious buildings of that era, the Auditorium proved in the course of years to be structurally unsound, as well as inadequate for the purposes for which it was designed. The result is thus summarized in the opinion rendered in the District Court.

> "Because of fundamental defects in the construction of the building, it will continue to deteriorate, and there is reasonable ground to believe that it will become unsafe. * * * In short, the building has passed into the class of old buildings which are being torn down in the central district of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected."

The equitable jurisdiction of the District Court rests upon the concrete case presented, and cannot be determined without a consideration of the facts. These are recited by the District Judge in his opinion, especially in the summary, reprinted on pages 32 to 35 of the petitioners' brief, of "the facts averred in the pleadings and established by the evidence." These facts are undisputed, and we refer to the printed record only for such facts as are not recited in the opinion.

The Association has an obsolete, unprofitable and prospectively ruinous building which, if the petitioners'

claim is sound, must be perpetuated for more than one hundred and fifty years to come. Its ponderous masonry walls enclose an interior of cast iron columns and bolted beams and girders, all supported upon floating foundations. (R. 292.) The whole building has settled, but the subsidence of the heavy outer walls has been much greater than that of the interior, amounting in some places to about 28 inches. (R. 218, 221.) The settlement continues, though at a reduced rate (R. 221, 230), and may at any time be accelerated by excavations or building operations in the vicinity. (R. 340, 349.) The difference in the rate of settlement has caused fractures in the interior framework, and is likely to cause more in the future, while the resulting distortion sets up strains that are difficult to detect, and may at any moment develop unforeseen trouble. (R. 344.) It is only by the exercise of unremitting vigilance that the building has been maintained in a condition of safety. (R. 259, 364.) The methods of design and construction employed in the erection of the Auditorium were the best known at the time, but are inadequate and improper from a modern point of view. A building of such dimensions would now be of steel construction with caisson foundations extending down to bedrock. The present building could not be made sound and physically safe except by inserting caissons underneath it, and pulling out and reconstructing the interior. (R. 340, 346.) Such caissons could not be installed with any assurance of success, and the experiment would be both costly and hazardous (R. 340, 532), and, if carried to a conclusion without disaster, would result in the production of a building with few of the present feaures except the outer shell, but still obsolete in design, unprofitable in operation, and increasingly detrimental to the property.

The Auditorium when built was at the southern edge

of commercial development (R. 246), but the district where it stands is now the choicest in the City of Chicago. (R. 285.) The value of the land in that locality has enormously increased, taxes have risen from $22,707.78 in 1890 to $148,480.40 in 1923 (R. 379), and costs of operation are mounting continually. The rents reserved by the original leases were a certain percentage of ground valuations fixed and agreed upon by the express terms of the leases themselves (R. 35, 52, 70), and were full and adequate compensation for the use of the land under conditions then existing (R. 287); but with the growth of the city and the changes in the environment, the leasehold estates, if susceptible of proper improvement, are now worth several million dollars. (R. 287.) The present building, however, is a detriment to the property and adds nothing to its value. (R. 234, 289, 343.) The land would be better without the building than with it. (R. 288.) The theater, originally designed to accommodate large gatherings, is no longer adequate for the purpose. (R. 235.) It has been superseded by large audience halls (R. 236), and its utilization is increasingly difficult. (R. 236.) The hotel and office portions are inadequately lighted; the elevators and the heating and wiring systems are inefficient; the finishing is old-fashioned and out of date; and the building is wholly unsuitable to modern conditions. The only return it ever paid to its stockholders was a dividend of one and one-half per cent in 1893, the year of the World's Fair. (R. 234.) The outstanding capital stock issued and paid for at par is $1,765,300, from which, together with the proceeds of the bond issues, the cost of the building, amounting to over $3,000,000 (R. 273), was defrayed. The Association has a bonded indebtedness of $1,375,000, of which $834,000 will be due February 1, 1929 (R. 205), and it has never been able to set aside a sinking fund for

retirement of those bonds. (R. 277.) It has with difficulty been able to meet its ground rents, interest payments and the increased burden of taxes (R. 234), and its total assets, except a contingent fund of about $375,000 (R. 244, 256), are substantially represented by the value of its leasehold estates. (R. 243, 244, 276.)

The only way in which the Association can realize a return on its property is by substituting for the present structure a modern building of increased height, constructed in accordance with present engineering methods and adapted to the altered conditions and the changed environment; otherwise it is confronted with financial ruin. Such an enterprise will require not less than $10,000,000. The funds are available when legal obstructions are removed; but the Association is now unable to take even the first step towards the realization of its plans because bankers whose aid must be invoked know that the lessors dispute its right to proceed with the improvement, and until the doubts are dispelled the Association must continue to be deprived of all beneficial use and enjoyment of its property. (R. 289.) It is the contention of the petitioners that the only way in which the Auditorium Association can obtain an adjudication of its right to replace the present obsolete building with a modern improvement is by actually beginning to tear down the old building (of course, without having been able to make any of the necessary financial arrangements), and then, if a forfeiture of the leases is asserted, by litigating the question whether the leases have been forfeited in fact. This is what the petitioners regard as the sole remedy available to the respondent.

The disagreement between the parties to this cause about the basis and nature of equity jurisdiction is fundamental. The petitioners, and the Sears-Slater trustees who, though aligned on the same side of the controversy,

do not for tactical reasons join them in this application, visualize equity as a code of remedial forms which define and limit its jurisdiction. These forms of equitable action exist in legal contemplation, or perhaps *in nubibus*, as ideal entities empty of content, and equity is powerless to redress the misfortune of any litigant who cannot fit the facts of his case into one of those moulds. This respondent, while prepared to show that its case would meet even that formal test, founds its title to relief upon a concrete situation arising out of the actual facts of the case. Equitable remedies have been classified for convenience under certain heads, but these are descriptive of the jurisdiction as it exists, and do not operate as an outlawry of remedies omitted from the scheme of classification. Our position is and always has been that the question of equitable jurisdiction in this case cannot be determined apart from the question of plaintiff's title to relief, and should this application for a writ of certiorari be granted we are gravely in error if it will be any more possible for this court than it was for the Circuit Court of Appeals to dispose of the jurisdictional issue as a logical abstraction apart from the realities of the case.

If this court, departing from its customary practice, should grant a writ of certiorari in advance of a final decree, and should then remand the cause to the District Court for a decision on the merits, the effect would be to aggravate the respondent's predicament, the existence of which constitutes its claim to equitable relief and which grows more acute with every month of delay. The record already contains all the evidence that either party was able to adduce, there is no dispute about the essential facts, and this court, if it should grant the writ, might conceivably dispose of the entire controversy on the merits once for all, as was done under substantially identical circumstances in *Sharon* v. *Tucker*, 144 U. S. 533. At

all events, we do not believe the academic question of equitable jurisdiction can be abstracted from the facts upon which it rests, and we respectfully submit that no reasons have been adduced which would warrant the removal of the cause to this court at the present stage of the litigation.

While the petitioners dispute this respondent's legal right to improve the Auditorium site, their position here is that no matter how clear the legal right might be, a court of equity is powerless to make it effective. In disposing of the jurisdictional question a court must therefore either assume that the legal right exists or else determine by examination of the facts whether it does exist or not. On this preliminary application it must be assumed that the legal right claimed by the respondent was clearly established and is not subject to question. For all purposes of the present argument the respondent has a property right of great value, which it is unable to enjoy by reason of obstacles which an appropriate decree of equity would in fact remove. The burden rests upon the petitioners to show why equity is disabled from exercising its remedial powers.

I.

ROLE ALLOTTED TO RESPONDENT BY PETITIONERS.

This respondent declines the part assigned to it by the petitioners at the outset of their brief. Nothing is farther from the fact than that the respondent has ever "narrowed its contentions to the single theory that the lessors have clouded its title, and *therefore* equity has jurisdiction to remove the cloud." This respondent does maintain that its bill may, if necessary or desirable, be characterized as one to remove cloud from title, but our major thesis always has been that the remedial jurisdic-

tion of equity is not restrained by any catalogue of labeled precedents. That such was our position in the Circuit Court of Appeals could be shown by numberless quotations from our brief, of which one may suffice:

> "It seems to us an ignominious task, and one certainly never exacted by the Supreme Court of the United States from any litigant, to spend ink or breath over the question whether a meritorious case, in which the need of relief is so urgent, will fit into this or that mould, or indeed into any mould, devised originally for convenience in promoting and not for the purpose of defeating the ends of justice."

If the bill in this cause needs the conventional label of a stereotyped form, we think it may be pigeonholed with bills to remove cloud from title, but we refuse to be bound by the limits of that narrow argument. No doubt there are preconceptions on this subject which may need to be overcome and which perhaps influenced the District Court, but we think the Circuit Court of Appeals agreed that the arm of equity is not yet paralyzed by formalism. Our contention is that *when there is a legal right to the beneficial use of property, when obstacles prevent the present enjoyment of that right, when a decree of equity would in fact remove those obstacles without injustice to private individuals or violation of any principles of public policy, and when the courts of law afford no adequate remedy, the jurisdiction of equity is complete.*

II.

EQUITABLE JURISDICTION NOT A LOCAL PROPERTY RULE.

This suit was begun in the Circuit Court of Cook County, Illinois. Even if it were necessary to define the bill as one to remove cloud, it was sufficient as such by Illinois law, and if it were not sufficient that fact would

be irrelevant after removal of the cause to the federal courts.

1. There is no rule of local law inconsistent with the decision of the Circuit Court of Appeals in this case. In Illinois, as elsewhere, equity has jurisdiction at the instance of a person who has a legal right to the beneficial use and enjoyment of property, but who is prevented from exercising that right by obstacles which an appropriate decree of equity would in fact remove, and which can be removed in no other way.

Fulwiler v. *McClun*, 285 Ill. 174.
Gavin v. *Curtin*, 171 Ill. 640.

2. Were there a conflict between the decision of the Circuit Court of Appeals and cases decided by the Supreme Court of Illinois, the existence of such a conflict would be irrelevant here. No state can by the action of its courts or of its legislature narrow the definition of a cloud on title so as to curtail the inherent jurisdiction of a federal court respecting the removal thereof. If a state legislature enlarges the definition of a cloud on title, the relief accorded by the statute may be administered by a federal court; but no state can restrict the inherent power of federal courts to remove clouds from title, or to grant other equitable relief.

Clark v. *Smith*, 13 Pet. 195.
McConihay v. *Wright*, 121 U. S. 201.
Guffey v. *Smith*, 237 U. S. 101.

III.

ALLEGED CONFLICT WITH DECISIONS OF THIS COURT.

One ground upon which writ of certiorari is asked is the supposed existence of a certain decision of the Supreme Court of the United States. There is no such de-

cision inconsistent with that of the Circuit Court of Ap
peals. The solitary citation of *Devine* v. *Los Angele*
202 U. S . 313 illustrates the mischief of quoting languag
wrested from its context. The point there involved wa
one of federal jurisdiction, not of equity jurisdictio
The plaintiff resorted to a United States court on th
ground that certain statutes were unconstitutional, bu
inasmuch as the rights predicated on those statutes wer
merely part of an anticipated defense, the decision wa
that the plaintiff's own case did not involve a federa
question.

The petitioners, however, without laying much stres
upon that case, resort under this head to a general argu
ment about the nature of clouds on title. The right t
relief is said to depend upon plaintiff's ability to la
hands on some metaphysical entity which a decree o
court would "remove." This is an argument calculate
to reduce to despair anybody who hopes to find a relatio
between jurisprudence and sound reason. That plain
tiff has the legal right to rebuild is granted by hypothe
sis; that it is prevented from doing so by doubts abou
that right is conceded; that a decree would in fact, with
out injustice to anybody, reinstate plaintiff in the en
joyment of this right cannot be denied; that no relief i
possible except through such a decree is manifest. Th
path to justice is alleged to be obstructed by a multitud
of legal maxims, appropriate no doubt to the situation
in which they originated, which, it is asserted, interpos
unsurmountable barriers to relief. Their inapplicabilit
to the present case can be shown in detail, but the demon
stration would far exceed the limits prescribed for thi
preliminary brief.

IV.

WHAT IS A JUSTICIABLE CONTROVERSY?

One of the main arguments of the petitioners is that the object of the bill is to obtain a declaratory judgment on moot questions about which there is no formal controversy. It is said that there is no assertion of adverse claim; that any such alleged assertion was merely oral; and that equity cannot declare rights in advance of a controversy respecting their existence. This was the view of Judge Wilkerson, as shown by the following sentences selected from his opinion:

> "It is of course elementary that the court is without power to construe these leases unless there is presented a case in which are involved rights of persons or property which are actually controverted in the particular case before the court. The plaintiff must ask that the defendant be decreed to do something. Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity."

If those propositions are elementary in actions at law or in any departments of equity they certainly are not elementary in the exercise of equitable jurisdiction as such. The ownership of property includes a right to its beneficial use; that right is coeval with the ownership and does not come into being for the first time when somebody disputes it; and one of the ordinary and most useful functions of equity is to render such a right available by the removal of obstacles to its enjoyment, no matter whether these obstacles are created by the wrongful acts of others or not.

Gavin v. *Curtin*, 171 Ill. 640.
Fulwiler v. *McClun*, 285 Ill. 174.
Sharon v. *Tucker*, 144 U. S. 533.

In the case last cited the owners of a title acquired by adverse possession obtained a decree establishing their right as against the holder of the patent title, who did not contest the suit and had not in any way disputed the rights asserted in the bill. The court in affirming the decree said:

> "The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. * * * As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment."

Equity regularly intervenes at the instance of an owner of valuable property rights for the purpose of removing obstacles to their free enjoyment, and this jurisdiction does not depend upon the rights being controverted nor require the court to order anybody to do anything. An ordinary foreclosure suit need not satisfy either of those conditions; indeed, the entire theory of parties in equity refutes the proposition that equity exists merely to redress wrongs or compose quarrels. This respondent is now deprived of the beneficial use and enjoyment of leasehold estates which, if susceptible of improvement, are worth several millions of dollars, but which are of little or no value while the respondent is prevented from exercising its legal rights by reason of the refusal of financiers and others to deal with it until a court of equity dispels the doubts arising out of the petitioners' claims.

If, however, jurisdiction were dependent on the active assertion of an adverse claim, the evidence is ample to satisfy even that condition. Interviews with the lessors had shown beyond the shadow of a doubt that they would resist any attempt of this respondent to rebuild. Negotiations in the modern business world are not framed in terms of direct defiance like a challenge to a duel. The iron hand is no less potent because concealed in a velvet glove. In any event, the answers explicitly denying the rights claimed by plaintiff in its bill (R. 168-170; R. 181-183) deprived the argument of any strength it might originally have had.

Blair v. *Chicago*, 201 U. S. 400, 449.
Bedford-Bowling Green Stone Co. v. *Oman*, 134 Fed. 441.
Brown v. *Cox*, 158 Ind. 364.
Vaca Valley Company v. *Mansfield*, 84 Cal. 560.

The notion has emerged in argument that equity cannot entertain a meritorious case when it involves issues which when isolated would not in themselves alone be sufficient to warrant the exercise of jurisdiction. The idea is refuted by a multitude of decisions. Equity will not entertain a bill to enjoin collection of an illegal tax, but the fact that such a tax must be enjoined is no bar to the jurisdiction of the court in a suit based on equitable grounds.

Ohio Tax Cases, 232 U. S. 576, 587.
Shaffer v. *Carter*, 252 U. S. 37.
Risty v. *Railway Company*, 270 U. S. 378.

Again it is frequently announced that equity will not enjoin a criminal prosecution, but it is no less clearly established that in a case proper for equitable cogni-

zance jurisdiction will not be refused because its exercise would involve such an injunction.

Ex Parte Young, 209 U. S. 123, 161.
Truax v. *Raich,* 239 U. S. 33, 37.
Terrace v. *Thompson,* 263 U. S. 197, 214.
Packard v. *Banton,* 264 U. S. 140.
Hygrade Provision Company v. *Sherman,* 266 U. S. 497.
Tyson & Bro. v. *Banton* ..... U. S. ..... (Feb. 28, 1927).

Judge Wilkerson in his opinion spoke of this case as one brought to construe leases, and interpreted the theory of the bill as coming to this, that:

> "Whenever a controversy arises between landlord and tenant as to the construction of the provisions of the lease touching the use of the demised premises, the tenant may resort to a court of equity, and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract."

Similar deductions are made in the petitioners' brief (p. 27) from the principles announced by the Circuit Court of Appeals. This difficulty appears to us to be altogether imaginary. The bill is not one to construe leases, but to obtain relief from an intolerable situation. If the court, in affording such relief, had to determine the legal effect of certain leases, it would not follow that the same court could be called upon merely to determine legal rights under the leases when no such situation existed.

V.

THE PRECEDENTS.

While jurisdiction in this case rests upon fundamental principles and not on the reiteration of rules of thumb, the actual decisions in cases most nearly approaching this upon the facts sustain the jurisdiction of equity.

The Illinois Supreme Court, after asserting, in *McCarty* v. *McCarty*, 275 Ill. 573, and other cases cited, certain of the general rules contended for by the petitioners, held expressly that they were inapplicable to a situation where a complainant was deprived of the present beneficial use and enjoyment of her property rights by obstacles which arose out of the terms of the instrument under which she claimed and which would in fact be removed by an appropriate decree.

Fulwiler v. *McClun*, 285 Ill. 174.

After reciting the facts on pages 175 and 176 of the report, the court disposes of the question of equitable jurisdiction in the following language (italics ours):

> "This was not a bill calling upon a court of equity merely to determine and declare a legal title, but it presented a case calling for the exercise of jurisdiction by the court, *on account of the situation of the property and its existing condition, to enable the complainant to have the beneficial use of the property devised to her.* The court had jurisdiction, and the doctrine of *McCarty* v. *McCarty*, 275 Ill. 573, did not apply to the case."

Among the decisions of this court *Sharon* v. *Tucker*, 144 U. S. 533 has already been commented upon. Efforts have been made to discredit it as an authority in the present case on the ground that it was no more than a bill to perpetuate testimony. The opinion discloses that the jurisdiction was not ultimately dependent

upon any such narrow grounds, but even if it had been, the present record shows with equal cogency a case requiring for its support the testimony of many witnesses respecting the transactions of forty years ago.

The Supreme Court of Massachusetts also sustained the power of equity to remove as a cloud upon title a building restriction which had become obsolete by reason of changes in the district where the property was situated.

McArthur v. *Hood Rubber Company,* 221 Mass. 372.

The case most nearly parallel to this proceeding, and the one which exhibits in the clearest relief the broad and narrow views of equity jurisdiction, arose in the State of New York.

Rector v. *Rector,* 201 N. Y. 1.

Judge Wilkerson in the District Court adopted the more timid views advanced in the minority opinion, and it has been pointed out that the so-called majority opinion was concurred in by only three judges out of seven, while a fourth merely agreed to the conclusion without giving his reasons. We invite careful attention to this case, with entire confidence that the prevailing opinion will be recognized as the one which deals in realities, and to the comment thereon in the opinion of the Circuit Court of Appeals in the present case:

> "The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accordable to opinions of the majority of divided courts. * * * Its persuasiveness, however, lies not in its isolation or in its uniqueness, but in its appeal to conscience."

Established precedents are persuasive in equity as at law. It is one thing, however, to say that equity should follow settled precedents, and quite another to say that it ought not to give needed relief unless an exact precedent can be found.

The petitioners insist, if we understand them aright, that the bill is nothing unless it is one to remove a cloud from a title; that equity never removes clouds from a title which has not already been established at law; and that the respondent, having no means of establishing its title at law, is without remedy of any kind. A plaintiff out of possession, as in the *Subirana* case cited on page 24 of the brief, must establish his right at law before asking a court of equity for further relief. That proposition is elementary. But since the courts of law are not open in this case, the petitioners contend that by a policy of masterly inactivity they can force this respondent to rest in its present predicament forever. It may have a good legal defense to any action that might be brought against it, but the lack of remedy at law consists in the very fact that its adversaries will not or cannot bring suit. Waiting for a lawsuit which will never be brought is not in any view an adequate remedy at law. It is not the *assertion* of the adverse claim but the very fact of its *non-assertion* that furnishes the ground for recourse to equity.

Holland v. *Challen*, 110 U. S. 15, 24.
Schwab v. *St. Louis*, 310 Mo. 116.
Slegel v. *Herbine*, 148 Pa. St. 236.
Voss v. *Murray*, 50 Ohio St. 19.

VI.

FEDERAL JURISDICTION.

Finally it is insisted that this cause is not a proper subject of federal jurisdiction and should be remanded to the state court in which it originated. The active defendants in this cause occupy two camps. There are the Sears-Slater trustees, owning one part of the fee, and the Willing trustees, owning another part. Their interests are identical, but their tactics differ. Removal of the obstacles which obstruct the enjoyment of one leasehold estate would in no manner affect the other. The issues between the plaintiff and the two groups of defendants were and are distinct, but, as is always permissible when there is a determining point common to the entire litigation, the plaintiff elected to unite in a single suit controversies or causes of action which might have been prosecuted separately. The Sears-Slater defendants, claiming to have a separable controversy, removed the cause to the federal court, and after Judge Wilkerson had denied the motion of both groups of defendants to dismiss the bill for want of equitable jurisdiction the Willing interests moved to remand the cause to the state court upon the ground that no separable controversy existed. Thus the two groups of defendants, by a convenient division of labor, placed themselves in a position to allege error whichever argument prevailed. The motion to remand was overruled by Judge Wilkerson and has been denied by the Circuit Court of Appeals, and the Willing interests, being the only defendants who can with good grace renew the protest against federal jurisdiction, apply alone for a writ of certiorari.

A bill to quiet title, or for similar relief, which contains no allegation that the defendants claim jointly or

from a common source, or that any privity of interest exists between them, presents a separable controversy, the defendants being joined for convenience.

Bacon v. *Felt*, 38 Fed. 870.
Bates v. *Carpentier*, 98 Fed. 452.
Carothers v. *McKinley Mining Co.*, 116 Fed. 947.
McMullen v. *Halleck Cattle Co.*, 193 Fed. 282.

A plaintiff, having two causes of action which present a common and decisive point of litigation, may at his election prosecute them separately or combine them in a single suit. If he adopts the latter alternative and some of the defendants remove their separable controversy to the federal court, the whole cause is removed, and the other defendants cannot refuse to go into the federal court because they are all citizens of the same state with the plaintiff and might have been sued separately.

Barney v. *Latham*, 103 U. S. 205.
Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Boatman's Bank v. *Fritzlen*, 135 Fed. 650 (certiorari denied, 198 U. S. 586).

Except in eminent domain or special assessment proceedings or other instances where distinct causes of action may be joined in one proceeding by authority of some special statute, the removal of a separable controversy carries the entire cause to the federal court.

Barney v. *Latham*, 103 U. S. 205.
Brooks v. *Clark*, 119 U. S. 502.
Road Dist. v. *St. Louis S. W. Ry. Co.*, 257 U. S. 547.
Pacific Railroad Removal Cases, 115 U. S. 1.
Deepwater Railway Co. v. *Western Pocahontas Co.*, 152 Fed. 824.
Young v. *Southern Pacific Co.*, 15 Fed. (2d) 280.

Conclusion.

This respondent respectfully urges that the decision of the Circuit Court of Appeals on the question of equity jurisdiction, now reported in 20 Fed. (2d) 837, was sound and right, and that the federal jurisdiction was properly sustained. No sufficient reason has been advanced for granting a writ of certiorari at the present juncture, certainly none of the reasons ordinarily assigned by this court for such intervention. There is no pretense that the case involves any questions of public importance. The petitioners assert that the opinion of the Circuit Court of Appeals conflicts with decisions of this court, with decisions of the Supreme Court of Illinois, and with decisions of the appellate tribunals of other federal circuits, but they fail to point out any such decisions. Any review by this court at the present time of the mere jurisdictional issues involved, followed by a further hearing in the District Court, by the inevitable appeal to the Circuit Court of Appeals, and by a further application to this court for a writ of certiorari, would entail a delay which would be disastrous to this respondent.

We request that the application for a writ of certiorari be denied.

Respectfully submitted,

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